IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13/07/2004

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S. SARDAR ZACKRIA HUSSAIN

Appeal Suit No. 1133 of 1988

1. R. Deivanai Ammal (Died)

2. M.K. Ramalingam
(2nd appellant was brought on record
as Legal Representative of deceased
sole appellant as per Order of Court
dated 10-12-2003 made in C.M.P.No.3049/2003) ..Appellant/Plaintiff.

-Vs-

1. G. Meenakshi Ammal,

2. Sivasubramanian,

3. G. Ramasamy. ..Respondents/Defendants 1 to 3.

Appeal Suit is filed under Section 96 of the Code of Civil Procedure, against Judgement and Decree dated 15-4-1988 made in O.S.No. 62 of 1985 on the file of Subordinate Judge, Sivaganga.

For appellant: Mr. AR.L. Sundaresan.

For respondents 1 to 3: Mr. R. Arunagirinathan.

:JUDGEMENT

(Judgement of the Court was delivered by P. Sathasivam,J.,)

Plaintiff in O.S.No.62 of 1985 on the file of Subordinate Judge, Sivaganga, against the dismissal of her suit has filed the above Appeal.

2. The suit was filed by the plaintiff/appellant herein praying for:

(a) partition of items 1 to 3 of plaint 'A' Schedule and 'B',' C' and 'D' schedule properties into four equal shares and allotment of one share to the plaintiff and for partition of item 4 of 'A' schedule properties into 12 equal shares and to put the appellant in separate possession of one such share;
(b) for directing the defendants to render true and proper accounts for the

income and expenses from the suit properties item 1 to 4 of 'A' schedule properties and pay plaintiff's share in the same towards past mesne profits; and
(c) to pay the plaintiff future mesne profits as may be fixed under Order XX Rule 12 C.P.C.
Since the suit was dismissed by the learned Subordinate Judge, the unsuccessful plaintiff has preferred the present appeal. For convenience the parties are referred as described before the trial Court.

3. The case of the plaintiff as set out in the plaint is briefly stated hereunder:
The plaintiff and the first defendant are daughters, and defendants 2 and 3 are sons of late Ganapathy Moopanar who died on 15-11-76. On the date of his death, he was possessed of item 4 of 'A' schedule which he received in a

partition on 20-12-1948 and items 1 to 3 of 'A' schedule property which he had acquired out of his selfearned income during his life time and that he had also left behind the movable assets referred to in 'B', 'C' and 'D' schedules.

4. The plaintiff reliably learnt that her father Ganapthy Moopanar had left behind him an unregistered Will which was with the attestor under which he had directed his properties to be divided equally and that even in the absence of the Will, plaintiff being the daughter is entitled to 1/4th share in items 1 to 3 of 'A' schedule and B,C and D schedules and 1/12th share in respect of item 4 of ' A' schedule. When the plaintiff demanded for partition, the defendants were evasive and hence she issued a notice dated 30-06-1985 to the defendants. The first defendant returned the notice and defendants 2 and 3 received the notice and issued a reply dated 5-07-1985 disputing the plaintiff's claim. Hence the suit.

5. The first defendant who is the sister of plaintiff and defendants 2 and 3 filed a separate written statement wherein it is contended that after the death of their father, two days later, the plaintiff and the first defendant claimed some share and a panchayat was conducted by 5 panchayatdars wherein it was decided to give Rs.8,000/-cash and 20 sovereigns of gold to the plaintiff and the first defendant each in full quit. After deliberation and agreement on 30 -11-76, the panchayat athakshi was written and signed by all the panchayatdars and she had affixed her thumb impression. The concrete house in items 1 and 3 of 'A' schedule and the shop in item 2 of the 'A' schedule was constructed by defendants 2 and 3. All the assets were only joint family properties and after the father's death she had relinquished her share.

6. Defendants 2 and 3 filed a common written statement wherein it is stated that item 1 of 'A' schedule was purchased by their paternal grand father in the name of their father as a tiled house, and in the year 1974, the house was constructed by defendants 2 and 3 out of their own exertions. Item No.3 was treated as joint family property comprising of the father and defendants 2 and 3 and that it was purchased out of joint family funds and that pucca house was constructed thereon in 1980.

7. Item No.2 of 'A' schedule was treated as joint family property and six shops were constructed thereon by defendants 2 and 3 in 1967. Item No.4 of 'A' schedule was joint family ancestral property and that defendants 2 and 3 out of their exertions had put up four houses thereon in 1965 and four houses in 1970. 'B' schedule and 'C' schedule were non-existent and 'D' schedule was not in possession of their father.

8. It is further contended that all the properties were always treated as joint family properties and the father had not left behind any Will as claimed by the plaintiff. On 25-11-76 the plaintiff and the first defendant came and asked for some share and thereafter a panchayat was held wherein it was decided to give each of them Rs.8,000/- cash and 20 sovereign of gold. The same was given and on 30-11-1976 and athakshi was executed. Hence the plaintiff is estopped from claiming any further share.

9. The plaintiff filed a reply statement inter alia denying the plea as to any panchayat, receipt of any share and execution of the alleged athakshi on 30-11-1976.

10. With the above pleadings, the plaintiff herself was examined as P.W.1 and two more witnesses as P.Ws.2 and 3 besides marking Exs. A-1 to A-9 in respect of her claim for partition. On the side of the defendants, second defendant was examined as D.W.1 and two more witnesses were examined as D.Ws.2 and 3, besides marking Exs. B-1 to B-28. The learned Subordinate Judge, after framing necessary issues and considering the materials placed, found the Will dated 5-1 1-1976 was suspicious and not true. The trial Judge also found that the settlement athakshi dated 30-11-1976 pleaded by the defendants was true; accordingly after holding that the plaintiff was not entitled any decree, dismissed her suit. Aggrieved by the same, the present appeal is filed by the

plaintiff. Pending appeal, the plaintiff/ appellant herein died and in her place, one M.K. Ramalingam was brought on record as her legal representative as per the order of this Court dated 10-12-2003 made in C.M.P.No. 3049/2003.

11. Heard Mr. AR.L. Sundaresan, learned counsel for the appellant and Mr. R. Arunagirinathan, learned counsel for respondents 1 to 3.

12. The points for consideration in this Appeal are:
(i) Whether all the properties except item 4 in 'A' schedule were self acquired properties of late Ganapathy Moopanar as claimed by the plaintiff or ancestral properties as claimed by the defendants?

(ii) Whether the plaintiff is entitled to 1/4th share in items 1 to 3 in 'A' schedule, 'B', 'C' and 'D' schedule properties and 1/12th share in fourth item of 'A' schedule as per Hindu Succession Act, 1956;

(iii) Whether the athakshi-Ex.B-28 dated 30-11-1976 is true and valid in law;

(iv) Whether the Will-Ex.A-9 dated 5-11-1976 said to have been executed by the deceased Ganapathy Moopanar is true and genuine one and as per the same, the

plaintiff is entitled to 1/4th share in the suit properties?

(v) Whether the learned Subordinate Judge is right in dismissing the suit?

13. First let us consider the nature of the suit properties, namely, self acquired properties of late Ganapathy Moopanar or ancestral properties and whether any nucleus was available to purchase the properties. Under the Hindu Law it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on the party alleging self-acquisitions to prove that the property was acquired without any aid from the family estate. In other words the mere existence of a nucleus however small or insignificant is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be part of the joint family property. Where the doctrine of blending is invoked against a person having income at his disposal and acquiring property, the reasonable presumption to make is that he had the income at his absolute disposal unless there is evidence to the contrary. If a coparcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a coparcener should not only barely plead the same, but also establish the existence of such a joint family fund or nucleus. Even if the joint family nucleus is so established, the prescription that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other coparcener is to be treated as joint family property. There should be proof of the availability of such surplus income or joint family nucleus on the date of such acquisitions or purchases. The same is the principle even in the cases where moneys were advanced on mortgages over immoveable properties. The onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. That may be so, in the case of a manger of a joint family, but not so in the case of all coparceners. For a greater reason it is not so in the case of female members.

14. The doctrine of blending of self-acquired property with joint family has to be carefully applied with reference to the facts of each case. No doubt it is settled that when members of a joint family by their joint labour or in their joint business acquired property, that property, in the absence of a clear indication of a contrary intention, would be owned by them as joint family property and their male issues would necessarily acquire a right by birth in such property. But the essential sine qua non is the absence of a contrary intention. If there is satisfactory evidence of an intention on the part of the acquirer such property to treat it as his own, but not as joint family property, the presumption which ordinarily arises, according to the personal law of Hindus that such property would be regarded as joint family property, will not arise.

15. It is a well-established principle of law that where a party claims that any particular item of property is joint family property, the burden of proving that it is so rests on the party asserting it. Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus should be such that with its help the property claimed to be joint could have been acquired. A family house in the occupation of the members and yielding no income could not be nucleus out of which acquisitions could be made even though it might be of considerable value.

16. In a Hindu joint family, if one member sues for partition on the foot that the properties claimed by him are joint family properties then three circumstances ordinarily arise. The first is an admitted case when there is no dispute about the existence of the joint family properties at all. The second is a case where certain properties are admitted to the joint family properties and the other properties in which a share is claimed are alleged to be the accretions or acquisitions from the income available from joint family properties or in the alternative have been acquired by a sale or conversion of such available properties. The third head is that the properties standing in the names of female members of the family are benami and that such a state of affairs has been deliberately created by the manager or the head of the family and that really the properties or the amounts standing in the names of female members are properties of the joint family. While considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. The extent of the property, the income from the property, the normal liability with which such income would be charged and the net available surplus of such joint family property do all enter into computation for the purpose of assessing the content of the reservoir of such a nucleus from which alone it could, with reasonable certainty, be said that the other joint family properties have been purchased unless a strong link or nexus is established between the available surplus income and the alleged joint family properties. The person who comes to Court with such bare allegations without any substantial proof to back it up should fail.

17. It is also a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upto it. But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been done from kindness or affection. The important point to keep in

mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention by his waiving or surrendering his special right in it as separate property. Such intention can be discovered only from his words or from his acts and conduct.

18. The above said principles (para 13 to 18) emerge from the following decisions:

(i) C.V. VYTHINATHA AIYAR v. C.V. VARADARAJA IYER and others-(1938-I M.L.J. 216)

(ii) KANDASWAMI CHETTIAR v. GOPAL CHETTIAR (1975-II M.L.J. 184)

(iii) R. SELVARAJ v. R. RADHAKRISHNA (AIR 1976 Madras 156)

(iv) P. KAMAKSHI AMMAL v. P. VENKATESAN (1986-I-M.L.J. 438)

(v) RANGANAYAKI AMMAL v. SRINIVASAN (1978-I-M.L.J. 56)

(vi) G. NARAYANA RAJU v. CHAMARAJU (AIR 1968 Supreme Court 1276)

19) In the light of the above principles now we shall consider how far the parties have proved their case by oral and documentary evidence. We have already referred to the relationship of the parties. It is the specific claim of the plaintiff that items 1 to 3 of plaint 'A' schedule properties were the self acquired properties of her father- Ganapathy Moopanar, and fourth item in the same schedule was allotted to him in the family partition dated 20-9-1948 between him (Ganapathy Moopanar) and his brothers. It is also her claim that the other items of properties in the other schedules of the plaint are the self acquired properties of Ganapathy Moopanar. The said Ganapathy Moopanar died on 15-11-1976. Since the plaintiff is the daughter and first defendant is her sister, defendants 2 and 3 are her brothers, according to the plaintiff, as per the provisions of the Hindu Succession Act, 1956, she has become entitled to 1/4th share in the plaint items 1 to 3 of 'A' schedule and 'B' to 'D' schedule properties and entitled to 1/12th share in the 4th item of plaint 'A' schedule. With reference to the said plea that the above said properties except item 4 in 'A' schedule are the self acquired properties of Ganapathy Moopanar, the plaintiff reiterated the above stand by way of oral evidence as P.W.1. She had stated that her father purchased item 1 of 'A' schedule property on 23-8-1926 under Ex. A-1 from one Uchappa Chettiar for a sum of Rs.500/-. We have already referred to to the fact that there is no dispute that Ganapathy Moopanar died on 15-11-1976 . If that is so, at the time of purchase of Ex.A-1, the age of Ganapathy Moopanar would be 20 or so. Learned counsel for the respondents-defendants would point out that it would

be improbable to purchase the property under Ex.A-1 for a sum of Rs.500/- at the age of 20 and that the said property could have been purchased from and out of the joint family nucleus left by Ramasamy, grand-father of Ganapathy Moopanar. It is seen from the evidence of P.W.1 that their family profession was weaving and they started attending weaving work even at the tender age. It is also pointed out by the counsel for defendants that even according to P.W.1 that her father was earning Rs.7 to 8 per day by weaving in 1954; hence it would not be possible for him to purchase any property from and out of his self earning. It is relevant to refer that 2nd defendant who was examined as D.W.1 though had stated that at the time of purchase of property under Ex.A-1, his father was not having separate income, he has stated even in chief examination that all the family members are weavers by profession and he and his brother doing weaving work even at the age of 10. If we accept the evidence of D.W.1 on this aspect, considering the fact that weaving was their profession and inasmuch as Ganapathy Moopanar was aged about 20 years at the time of purchase of property under Ex. A-1, it would be possible for him to earn income by weaving.

20. As far as the claim of joint nucleus left by the father or grand-father of Ganapathy Moopanar is concerned, there is no iota of evidence, except the oral evidence of D.W.1. It is further seen that Ganapathy Moopanar purchased other two properties for Rs.6 00/- and Rs.1,000/- respectively under Ex.A-2 dated 17-1-1954 and Ex.A-3 dated 5-12-1954. All the said properties were purchased by Ganapathy Moopanar in his name out of his earnings. As said earlier, though D.W.1 has stated that all the properties under Exs. A-1 to A-3 were purchased in the name of Ganapathy Moopanar from and out of the family nucleus and from the earnings of all the three, admittedly, at that time D.W.1 was aged about 10 years and studying in fourth Standard. It is evident that when he deposed as D.W.1 on 12-2-1987 before the Sub Court, it is noted that he was aged about 45 years. The properties under Exs. A-2 and A-3 were purchased in 1954. If that is so, at that time D.W.1 would not have crossed 12 years and his brother would be below 10 years. In such a circumstance, it cannot be accepted that D.W.1 and his brother contributed for the purchase of properties under Exs. A-2 and A-3. The other two witnesses, namely, D.Ws.2 and 3 have not spoken to about the properties purchased under Exs. A-1 to A-3 and they were examined only to speak about "athakshi".

21. The defendants have also pressed into service Exs.B-13 to B-24-Cards issued for supply of yarn to the family of Ganapathy Moopanar. We have verified those documents. First of all, no one has explained the contents of those documents. Secondly, merely because the name of Ganapathy Moopanar finds a place in those Cards, we are of the view that those documents do not improve the case of the defendants to show that there was a joint family nucleus at the time of purchase of Exs. A-1, A-2 and A-3 properties that were purchased from and out of the joint earnings of Ganapathy Moopanar and defendants 2 and 3. On the other hand, in the light of the principles referred to above, in the absence of acceptable evidence regarding joint family nucleus, considering the age of defendants 2 and 3 at the relevant time, namely, purchase of properties under Exs. A-1, A-2 and A-3, we hold that no joint family nucleus was available and the properties purchased under Exs. A-1 to A-3 were self acquired properties of Ganapathy Moopanar.

22. Now we shall consider the legality and enforcibility of Athakshi-Ex.B-28 dated 30-11-1976. The defendants in their separate written statements alleged that after the death of their father, if some properties towards their share were given to them, then only they could be able to attend the obsequies which was to be held on 15th day. It is also the defendants case that because of the above request by the plaintiff and the first defendnat, after deliberations with elderly persons of their village, particularly in the presence of V.P. Sundara Mahalingam (D.W.3), T. Ganesan Chettiar, N. Thiyagarajan, A. Annamalai (D.W.2), Rajarathinam, a decision was arrived for payment of cash of Rs.8000/- and 20 sovereign gold each to the plaintiff and first defendant by defendants 2 and 3 in full quit. It is also their claim that the said panchayat decision was entered into in the form of an 'Athakshi' on 30-11-1976 which has been marked as Ex.B-2 8. It is also their claim that in view of their settlement with plaintiff and first defendant as borne out by the Athakshi-Ex.B-28, the plaintiff is estopped from claiming any share. On the other hand, the plaintiff has denied the alleged panchayat talk and settlement of cash and 20 sovereign gold in lieu of share in her father's properties. The plaintiff has also raised an objection. Even if the said transaction is true, since by virtue of Ex.B-28, the plaintiff and first defendant relinquished their right/share in the properties of Ganapathy Moopanar. Inasmuch as the said document is not duly stamped and registered, the same is inadmissible in evidence and not valid in law. In order to appreciate the rival contentions, it is useful to refer the Athakshi-Ex. B-28:

(VERNACULAR PORTION DELETED)

Apart from the legality and enforcibility of the above document, elaborate arguments were advanced regarding its genuineness. We have already referred to the specific denial of the plaintiff in her plaint as well as in her evidence as P.W.1 regarding the alleged panchayat and settlement of cash of Rs.8000/- and 20 sovereigns of gold in lieu of her share in the property of Ganapathy Moopanar. Though first defendant-Meenakshi Ammal, sister of the plaintiff supported the case of defendants 2 and 3, her brothers as well as Athakshi-Ex.B-28, she did not venture to appear before the Court to put-forth her case except filing written statement. D.W.1, second defendant in his evidence has stated that on the eve of death of his father, his sisters i.e., plaintiff and first defendant demanded their share, for which they convened a panchayat. According to him, the panchayat took place 5 or 6 days after the death of his father. He is also one of the signatories along with other defendants. It is relevant to note that though D.W.1 was examined in chief even as early as 12-2-1987 and he has spoken to the alleged panchayat and payment of cash and jewels and also execution of Athakshi on 30-11-1976, the said document-Ex.B-28 had not been produced. Only on 6-4-87 when he was summoned once again, he produced and marked the Athakshi-Ex.B-28. There is no explanation for not filing the athakshi along with the written statement in the year 1986 nor producing the same when he was examined in chief on 12-2-19 87. This aspect leads to a suspicion with regard to the genuineness of Ex.B-28. One more relevant aspect is that though he sent a reply to the suit notice-Ex.A-5, admittedly though he was possessed Ex.B-28 Athakshi, the said aspect was not informed to his advocate nor mentioned in the reply notice. In

his evidence it is stated that,

(VERNACULAR PORTION DELETED)

The above conflicting statement also creates suspicion to the genuineness of Ex.B-28. He also stated that the plaintiff and her husband attended and participated in the said panchayat. Likewise, according to him, the first defendant and her husband also participated besides several panchayatdars. He asserted that both the husbands of his sisters participated in the panchayat. On the other hand, D.W.3 claiming to be one of the attestors of Ex.B-28 has stated that plaintiff alone participated and her husband did not turn up. Likewise, though D.W.1 has stated that panchayat went for 2 days, D.W.2, one of the attestors of Ex.B-28 has stated that the panchayat was completed in one day. He is not in a position to recollect the date, month and year of the panchayat said to have been taken place and settlement of cash and jewels to the plaintiff and the first defendant. Admittedly, the scribe of Ex.B-28 by name Rajarathinam was not examined. There is no explanation for non-examination of the scribe on the side of the defendants. As said earlier, though the defendants have examined D.Ws.2 and 3, attestors of Ex.B-28, their evidence is not convincing since it contains lot of contradictions in all major events regarding convening of panchayat, number of persons involved/participated, presence of plaintiff and her husband, first defendant and her husband, duration, out-come of the panchayat etc. In such a circumstance, as rightly argued by the learned counsel for the appellant, it is not safe to rely on their statement. We are also satisfied that the defendants miserably failed to prove the genuineness and due execution of Ex.B-2 8 Athakshi.

23. Apart from the infirmities in Ex.B-28, as pointed out above, learned counsel for the appellant vehemently contended that the said document is invalid in law since it is unstamped and unregistered for which he very much relied on a Division Bench decision of this Court in Lakshmipathy, A.C. v. A.M. Chakrapani Reddiar, reported in 2001 (1) CTC 112. On the other hand, Mr. R. Arunagirinathan, learned counsel for the respondents, would contend that the panchayat was held 3 or 4 days after the death of Ganapathy Moopanar and after arriving at a settlement, the terms were incorporated in the form of a document on 30-11-76 i.e., Ex. B-28; hence it does not require proper stamp and it need not be registered for which he relied on a decision of the Supreme Court in Kale v. Dy. Director of Consolidation, reported in AIR 1976 Supreme Court 807. In the said decision Mr. R. Arunagirinathan very much pressed into service para 10 (4) which reads as under:

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveable properties and therefore does not fall within the mischief of Section 17 (2)(sic) (Sec. 17(1)(b)?) of the Registration Act and

is, therefore, not compulsorily registrable;

It is argued that panchayat was held 4 or 5 days after the death of Ganapathy Moopanar, and on the basis and on certain terms arrived at therein, an Athatchi under Ex.B-28 was executed only on 30-11-1976, in such a circumstance, according to the counsel, it is only a memorandum prepared after the family arrangement had already been made and the said Athakchi is only for the purpose of record; hence it need not be stamped nor registered. It is true that the above referred Supreme Court decision makes it clear that registration would be necessary only if the terms of family arrangement are reduced into writing. A distinction was made in that decision. An arrangement was made and thereafter a memorandum was prepared either for the purpose of record or for making necessary mutation. Then it does not require registration. However, in our case it is clear from Ex.B-28 and the evidence let in that in lieu of their share in the properties of Ganapathy Moopanar on receipt of cash of Rs.8,000/- and jewels worth 20 sovereigns the document says that the plaintiff and the first defendant relinquished their right. In other words, only on execution, namely, on the date of execution the plaintiff and first defendant received the cash and jewels and relinquished their right in the property of Ganapathy Moopanar. Though Mr. Arunagirinathan argued that panchayat and settlement was made prior to the execution of Ex. B-28, the perusal of the recital in that document amply show that both parties i.e., the plaintiff and the first defendant, daughters of Ganapathy Moopanar, on receipt of cash and jewels, agreed to relinquish their entire right in his properties. Ex. B-28 proceeds with the date, month and year, namely 30-11-1976. It is useful to refer once again the relevant important paragraph in Ex. B-28:

(VERNACULAR PORTION DELETED)

The above recital makes it clear that on receipt of cash of Rs.8000/- and 20 sovereign jewels, they agreed to relinquish their right on the date mentioned above i.e., 30-11-1976. In such a circumstance, we are of the view that Ex. B-28 was executed not for the purpose of record or for information for making necessary mutation, but it is a document in and by which the plaintiff and the first defendant relinquished their right, interest, share in the properties of Ganapathy Moopanar. In this regard, it is relevant to refer the Division Bench decision reported in 2001-C.T.C. 112 (cited supra). The Division Bench after referring to the decisions of various High Courts and the Supreme Court, summed up the legal position in the following way:

"42. To sum up the legal position
(I) A family arrangement can be made orally.
(II) If made orally, there being no document, no question of registration arises.
(III) If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

(IV) Whether the terms have been reduced to the form of a document is a question of fact in each case to be determined upon a consideration of the

nature of phraseology of the writing and the circumstances in which and the purpose with which it was written.

(V) However, a document in the nature of a Memorandum, evidencing a family arrangement already entered into and had been prepared as a record of which had been agreed upon, in order that there are no hazy notions in future, it need not be stamped or registered.

(VI) Only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

(VII) If the family arrangement is stamped but not registered, it can be looked into for collateral purposes.

(VIII) Whether the purpose is a collateral purpose, is a question of fact depends upon facts and circumstances of each case. A person cannot claim a right or title to a property under the said document, which is being looked into only for collateral purposes.

(IX) A family arrangement which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in Section-35 of the Indian Stamp Act."

The document in our case, namely, Athatchi-Ex.B-28 comes within the legal position No.3 pointed out above. As said earlier, Ex. B-28 is not only a document of family arrangement reduced to writing, but it purports to create, declare/extinquish right, title or interest of the properties of Ganapathy Moopanar. In such a circumstance, we hold that it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act respectively. There is no dispute that if a document is in the nature of a memorandum evidencing a family arrangement already entered into and document prepared as a record of what had been agreed upon, it need not be stamped or registered. Considering the recital in the document and categorical statement made therein, we are satisfied that Ex. B-28 cannot be treated as a mere document in the nature of memorandum, but it is a family arrangement in which plaintiff and 1st defendant extinguished their right, title or interest of the immoveable properties of Ganapathy Moopanar by accepting cash and jewels as agreed to in para 2 of the document; accordingly we hold that the said document Ex.B-28 which is not stamped and not registered cannot be looked into for any purpose in view of the specific bar in section 35 of the Indian Stamp Act. The learned Subordinate Judge failed to advert these material aspects and committed an error in relying on the said document; accordingly the said conclusion cannot be sustained.

24. Though it is contended that since the family members are in occupation of the dwelling house left by Ganapathy Moopanar, the plaintiff being the female member has no right to ask for partition till the male members decide to partition of their properties, the evidence let in and the materials placed

clearly show that Ganapathy Moopanar had left several houses besides various other properties, we are of the view that Section 23 of the Hindu Succession Act, 1956 is not an absolute bar to the claim of the plaintiff, hence we reject the said contention.

25. Under these circumstances, we are satisfied that the learned Subordinate Judge has committed an error in dismissing the suit. On the other hand, we hold that the plaintiff has proved and established her claim for partition and separate possession in respect of the schedule properties. Accordingly, there shall be a preliminary decree for partition in respect of 1/4th share in items 1 to 3 in A schedule properties and B, C, D schedule properties and 1/12th share in fourth item in A schedule property. The defendants are liable to render true and proper accounts for the said properties. Future mesne profits are to be fixed by a separate proceedings under Order XX Rule 12 C.P.C. Appeal is allowed. Considering the relationship of the parties, there shall be no order as to costs.

R.B.
Index:- Yes.
Internet:- Yes.
To:-
1. The Subordinate Judge, Sivaganga (with records)

2. The Record Keeper, V.R. Section, High Court, Madras.